Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT

BRIEF FOR RESPONDENT

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PETITION FOR CERTIORARI FILED JULY 24, 1975
CERTIORARI GRANTED OCTOBER 14, 1975

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Petitioner's Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioner's Brief.

QUESTIONS PRESENTED

Whether, absent an emergency, a permanent public employee may be summarily suspended from his job without pay for 29 days prior to any notice of the charges against him or opportunity for any hearing to challenge those charges.[1]

1. In his Brief, Petitioner requests this Court to review that aspect of the original District Court Order denying Respondent's challenge to the constitutionality of the Chicago Fire Department personal appearance regulation [Pet. Br., p. 3]. The Court of Appeals explicitly declined to rule on that aspect of the District Court Order, reversing the District Court solely on the grounds that Respondent's suspension violated his right to due process of law. In accord with well established principles of this Court, this Court will not pass on issues not considered by the Court of Appeals. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388, 91 S. Ct. 1999 (1971); *F. T. C.* v. *Travelers Health Ass'n.*, 362 U. S. 293, 80 S. Ct. 717 (1960); *Carroll* v. *United States*, 354 U. S. 394, 396, n. 2, 77 S. Ct. 1332 (1957); *Owens* v. *Union Pac. R. Co.*, 319 U. S. 715, 63 S. Ct. 1271 (1943). Accordingly, Respondent will not argue the issue to this Court. Assuming, *arguendo*, that this Court decides to consider the constitutionality of the appearance regulation, an additional question is presented: whether the District Court erred in refusing to rule that § 51.133 of the Rules and Regulations of the Chicago Fire Department prescribing "proper personal appearance" is unconstitutional on its face and as applied. On this question, Respondent adopts the response of Amicus Curiae, AFL/CIO.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

In addition to the constitutional provisions, statutes and administrative regulations cited by Petitioner, this case involves the following provisions:

Rules and Regulations of the Chicago Fire Department

Part VI. Offenses, Procedures and Penalties in Respect to Violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department . . .

> Members or other employees who shall be found guilty of infractions of any of the Rules and Regulations, Practices and Procedures of the Fire Department, shall be subject to the penalties hereinafter enumerated.
>
> § 61.001: Conduct unbecoming a member or employee of the Chicago Fire Department.
>
> • • • • •
>
> PENALTIES
>
> Section 61.107. Disciplinary Action for Violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department.
>
> 1. Reprimand.
>
> 2. Suspension from the Fire Department for a period not to exceed thirty days.
>
> 3. Orders to appear before the Civil Service Commission for a hearing. (Additional suspension periods could be given depending upon the decision of this Board).
>
> 4. Discharge from the service of the City.

Rules of the Chicago Civil Service Commission
Rule VI, Section 7 [2]

Section 7 This section shall be applicable to suspensions of all Civil Service employees except those in the Department of Police.

Section 7. A. Emergency Suspension. The employee shall be served with a notice of suspension with an express finding by the department head that the public safety or the good of the department, or both, require the immediate suspension of the employee.

No later than seven days after service of the notice of emergency suspension the Civil Service Commission shall review the order of the department head together with the reasons therefore and shall at that time preliminarily confirm or reverse such order. If the order is reversed the employee shall be reinstated and paid for any period under suspension as a result of the order. If the order is preliminarily affirmed the Civil Service Commission shall within 21 days of such affirmance afford the employee an opportunity to appear before the Commission, and to receive a hearing pursuant to the rules of the Commission.

If the Civil Service Commission, upon hearing, determines that the suspension was unwarranted, the Commission shall reinstate the employee and order that the employee be paid for any period under suspension as a result of the unwarranted order.

Section 7. B. Suspension of Not More Than Five Days, In the Absence of Emergency. Within 24 hours after service of a notice of suspension for not more than five days, in the absence

2. The Rules of the Chicago Civil Service Commission were amended to add this provision in August, 1975 after the decision of the Court of Appeals in this action. Pursuant to counsel's obligations as set forth in *Fusari* v. *Steinberg*, 413 U. S. 379, 95 S. Ct. 533 (1974), counsel call this Court's attention to the changes in Petitioner's procedures for suspensions of fewer than thirty days.

of emergency, the employee may request in writing that he be granted a hearing before an officer designated by the department head. No such suspension shall be effective for 24 hours after service of the notice of suspension.

If no request for hearing is made within 24 hours after receipt of the notice, such suspension shall become effective after 24 hours following service.

If a hearing is requested, and after reviewing the record of the hearing, the department head conforms to his initial decision, the department head shall notify the Civil Service Commission and the suspension shall become effective upon such notification; no suspension shall become effective until the department head so notifies the Civil Service Commission.

Section 7. C. Suspensions in Excess of Five Days, in the Absence of Emergency. Within 24 hours after service of a notice of suspension in excess of five days, in the absence of emergency, the employee may request a hearing before the Civil Service Commission by filing a written request with the Secretary of the Civil Service Commission; no such suspension shall be effective for 24 hours after service of the notice of suspension.

If no request for hearing is made within 24 hours after receipt of the notice, such suspension shall become effective after 24 hours following service.

If a hearing is requested and the Civil Service Commission affirms the decision of the department head, the suspension shall become effective immediately; no suspension shall take effect until so ordered by the Civil Service Commission.

Section 7. D. A copy of this section on suspension procedures shall be attached to every Notice of Suspension.

STATEMENT OF THE CASE

This case presents the question of whether a permanent, tenured public employee may be suspended from his job without pay for 29 days before he is given notice of his alleged offense and an opportunity to defend himself. On February 27, 1974, three administrators of the Chicago Fire Department entered the duty station where Lt. Francis Muscare, an officer with twenty years' service in the Department, was working at his job as a fire fighter and ordered him to turn in his equipment and leave the premises immediately; he was suspended from his job (A. 5).[3] Lt. Muscare was told nothing further than that he could expect to receive a letter about his suspension (A. 5).

Five days later, on March 4, 1974, Lt. Muscare did receive a letter from Walter R. Braun, Fire Department Chief of Personnel, informing him for the first time that he had been charged with violating the Rules and Regulations of the Chicago Fire Department, §§ 61.001, 61.006 and 51.133 (A. 12):

(1) § 61.001 of the Rules and Regulations of the Chicago Fire Department creates the offense of "conduct unbecoming a member or employee of the Chicago Fire Department" (A. 14).[4]

3. References to authorities cited in the printed Appendix shall hereinafter be referred to as "A. ....."

4. In his anxiety to characterize Lt. Muscare's suspension as attributable entirely to his possession of a goatee in violation of the personal appearance rule (Pet. Br., p. 31), Petitioner has neglected to mention that the letter of March 4 also accused Lt. Muscare of violating this section of the Rules and Regulations. Petitioner's Brief to this Court fails to reproduce § 61.001, which is reproduced in this Brief at p. 3. Both before the District Court and on appeal, Lt. Muscare challenged the enforcement of this vague prohibition (A. 7), which, as he testified, he had never heard explained in twenty years with the Fire Department (A. 128-129).

(2) § 61.006 creates the offense of "disobedience of orders" (A. 14).

(3) § 51.133 prescribes the "proper personal appearance" for the members of the Chicago Fire Department (A. 13).

The Braun letter also informed Lt. Muscare that his suspension was to last 29 days from its inception five days earlier (A. 12).

Since September 1973, Lt. Muscare had worn a small mustache and a goatee (A. 4, 10, 11). Approximately two and one-half months prior to the events of February 27, 1974, one of Lt. Muscare's superior officers, a Chief Morgan, had told him that he should shave his goatee and that he would be working under charges (A. 5).[5] Thereafter, on December 21, 1973, someone filed written charges against Lt. Muscare with Acting Chief Fire Marshal William F. Foley (A. 104, 110). However, Chief Foley determined that he would take no action against Lt. Muscare at that time, allegedly in the hope that Lt. Muscare would voluntarily shave his goatee (A. 134).[6] Chief Foley did not inform Lt. Muscare of either his decision or the reasons for it.

Several days later, Chief Foley became incapacitated by illness (A. 105). Although during the weeks of his absence, he was replaced by another officer (A. 108), Chief Foley did not instruct his substitute to take any action on the charges lodged against Lt. Muscare in December (A. 109). The written charges against Lt. Muscare were allowed simply to lie on Chief Foley's desk (A. 108-109).

5. According to the Fire Department procedures, Chief Morgan was not empowered to make decisions regarding discipline of Lt. Muscare. He could only lodge charges against Lt. Muscare with a higher ranking administrator, ordinarily William F. Foley, Acting Chief Fire Marshal of the Chicago Fire Department (A. 108).

By Chief Foley's own testimony, only he or someone in his position can make the decision to suspend an employee in Lt. Muscare's position (A. 108).

6. During encounters with the administration over the issue of his goatees in prior years, no disciplinary action had been taken against Lt. Muscare, and the matter had been resolved informally (A. 123-125).

Chief Foley returned to work about February 10 (A. 105). Sometime during the next seventeen days, Chief Foley abandoned his December decision and determined to impose "firm" discipline against Lt. Muscare.[7] Thereupon, he dispatched the three deputies to Lt. Muscare's post (A. 133). Thus, two and one-half months elapsed from Chief Morgan's remark to Muscare in December until the Department acted, during which time Lt. Muscare was routinely working at his job. When Chief Foley changed his December decision and determined to suspend Muscare for 29 days, he did so without having communicated with Lt. Muscare at all (A. 110-111).

As Petitioner acknowledged at trial, the choice of a 29-day suspension ensured that Lt. Muscare would be punished for the longest period which did not require prior notice and hearing (A. 134-135).[8] Although Lt. Muscare was entitled to request a review of the 29-day suspension after it was imposed,[9] the Braun letter, Lt. Muscare's first and only notice of the length of his suspension and the alleged reasons therefor, does not mention his right to a post-suspension review (A. 12).

Upon receipt of the Braun letter, Lt. Muscare filed this action pursuant to 42 U. S. C. § 1983 challenging the constitutionality of the Fire Department's actions against him,[10] requesting declaratory and injunctive relief and damages (A.

7. According to Chief Foley, one reason for the severity of the discipline he imposed was his understanding of Lt. Muscare's prior encounters with the administration of the Fire Department (A. 133-134). The record indicates that Chief Foley played no role in any of these prior encounters (A. 122-125).

8. Pursuant to Illinois law, a permanent civil servant may not be suspended for more than 30 days without notice and a hearing prior to the suspension. *Ill. Rev. Stat.*, Ch. 24, § 10-1-18.

9. Under Illinois law, the subject of a suspension of 5 to 30 days may request a review of the propriety of the punishment at an unspecified time after the suspension is imposed. *Ill. Rev. Stat.*, Ch. 24, § 10-1-18.

10. From the outset of this litigation, one of Lt. Muscare's challenges was specifically directed to the constitutionality of the suspension procedures at issue herein (A. 7-8).

8-9). After a hearing on Respondent's request for a preliminary injunction, District Court Judge McGarr ruled that Petitioner's suspension of Lt. Muscare was constitutional.[11] Lt. Muscare filed a Motion for Reconsideration of Judgment, requesting that the Court specify that it was also denying Lt. Muscare's constitutional challenge to the procedures used to suspend him from his job (A. 138-139; 144-145; 151-152). Following the Court's denial of the Motion for Reconsideration, Lt. Muscare appealed to the United States Court of Appeals for the Seventh Circuit (A. 154).

The Court of Appeals reversed the District Court (A. 158-166). Noting that Lt. Muscare was suspended two and one-half months after Chief Morgan's remarks, the Court concluded that he had no meaningful notice of the three charges against him and no opportunity to answer them before he was disciplined and held that these infirmities violated Lt. Muscare's constitutional rights to due process (A. 161-164). The Court of Appeals specifically referred to this Court's recent decision in *Goss* v. *Lopez*, 419 U. S. 565, 95 S. Ct. 729 (1975), where this Court held that students in public schools are entitled to some measure of due process of law before they are suspended for even ten days. Reasoning that *Goss* indicated the proper resolution of Lt. Muscare's case, the Court determined that a permanent public employee has interests more deserving of protection under the due process clause than the students' interests which were the subject of *Goss* (A. 164). The Court ruled:

> It can hardly be disputed that appellant, as a twenty year veteran of the civil service, has a protected property interest in his employment, for "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment

11. At trial, Petitioner defended the constitutionality of the personal appearance rule (§ 51.133) on the grounds that it was a measure necessary to ensure safe use of the self-contained breathing apparatus (A. 51-136).

absent sufficient cause for discharge may demand the procedural protections of due process." 95 S. Ct. at 735. Nor can it be disputed that appellant's suspension for 29 days is not *de minimis*, and the "Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 95 S. Ct. at 737. It remains to answer the question what process is due, for in each situation the requirement is a flexible one.

As the Court has stated before and reaffirmed in *Goss*, "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950). In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.

Public employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency. Whether such persons should be granted the full panoply of rights envisioned in Ill. Rev. Stat., Ch. 24, § 10-1-18, for suspensions greater than 30 days is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension. (A. 163-164)

The Petition for Certiorari to this Court followed.

SUMMARY OF ARGUMENT

This case involves the suspension of a permanent public employee from his job with no notice or opportunity for a hearing prior to the action against him.

I. Respondent in this action, Lt. Francis Muscare, enjoys a property interest in his employment which protects him against being suspended for 29 days without due process of law.

II. Based on *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 92 S. Ct. 2701 (1972), under *Goss* v. *Lopez*, *supra*, and the opinions of a majority of this Court in *Arnett* v. *Kennedy*, 416 U. S. 134, 94 S. Ct. 1633 (1974), before a permanent public employee may be suspended, due process requires that he be provided with notice of the charges against him and a reasonable opportunity to respond to those charges. In *Arnett*, a majority of this Court agreed that the due process clause requires protective procedures before a public employee may be deprived of his employment. In *Goss*, this Court analogized school children to public employees and ruled that, in the absence of prior procedures, school children could not be suspended for even ten days. This case presents that instance in which it was the public employee who was suspended without any prior procedures. Thus, this Court's opinions in *Goss* and *Arnett* necessitate affirmance of the opinion of the Court of Appeals that, absent an emergency, before a public employee may be suspended from his job, some prior procedures are required.

III. Neither Petitioner's conduct in this case nor the opportunity for limited later review of the suspension meet the minimal requirements of notice and an opportunity for a hearing required under the due process clause.

ARGUMENT

THE SUSPENSION OF LT. MUSCARE BY THE CHICAGO FIRE DEPARTMENT VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

I.

A Permanent Public Employee May Not Be Suspended from His Public Employment Without Due Process of Law

Since 1955, Respondent Lt. Francis Muscare has been employed as a fire fighter with the Fire Department of the City of Chicago (A. 5). As a Chicago fire fighter, Lt. Muscare enjoys the status of a permanent, tenured civil servant. Ill. Rev. Stat., Ch. 24, § 10-1-18.[12] It is now well settled that such a

12. Section 10-1-18 provides in part:

10-1-18. Removal—Suspension—Retirement] § 10-1-18. Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before the civil service commission, or by or before some officer or board appointed by the commission to conduct that investigation. The finding and decision of that commission or investigating officer or board, when approved by the commission, shall be certified to the appointing officer, and shall forthwith be enforced by that officer. Before any officer or employee in the classified service of any municipality may be interrogated or examined by or before any disciplinary board, or departmental agent or investigator, the results of which hearing, interrogation or examination may be the basis for filing charges seeking his removal or discharge, he must be advised in writing as to what specific improper or illegal act he is alleged to have committed; he must be advised in writing that his admissions made in the course of the hearing, interrogation or examination may be used as the basis for charges seeking his removal or discharge; and he must be advised in writing

(Continued on next page)

permanent, tenured civil servant possesses a property interest which cannot be taken from him without meeting the constitutional requirements of due process of law. *Arnett, supra,* 416 U. S., at 164 (Powell, J., concurring); at 171 (White, J., concurring and dissenting); at 206 (Marshall J., dissenting); *Board of Regents of State Colleges* v. *Roth, supra,*[13] *Perry* v. *Sindermann,* 408 U. S. 593, 92 S. Ct. 2694 (1972); *Connell* v. *Higgin-*

(Continued from preceding page)

that he has the right to counsel of his own choosing present to advise him at any hearing, interrogation or examination; and a complete record of any hearing, interrogation or examination shall be made and a complete transcript thereof made available to such officer or employee without delay. Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission, concerning the propriety of such suspension. . . .

In order to obtain the protected status of a permanent civil servant, under § 10-1-18, candidates for such positions must meet a series of statutory requirements, including examination for the position (Ch. 24, § 10-1-7), selection from a register of eligible candidates (Ch. 24, § 10-1-12), and, in the case of a fire fighter, the completion of a course of instruction at the Fire Academy (Rules and Regulations of the Chicago Fire Department § 21.413 and § 51.117). Before promotion to the rank of lieutenant, the candidate must serve first in the lower rank of fire fighter and pass a promotional examination (Ch. 24, § 10-1-13). Only after fulfilling all of these requirements does a person become entitled to occupy the Civil Service position of lieutenant with the Chicago Fire Department.

Ch. 24, § 10-1-18 was recently construed by the Illinois Supreme Court in *Kropel* v. *Conlisk,* 60 Ill. 2d 17, 322 N. E. 2d 793 (1975). In sustaining an analogous provision of Illinois law governing the Chicago Police Department (Ch. 24, § 10-1-18.1), the Illinois Supreme Court ruled that § 10-1-18 provides only post-suspension review hearings in suspensions of 5 to 30 days and that such post-suspension hearings satisfy the requirements of the due process clause.

13. Lt. Muscare's career as a public employee is precisely the kind of property recognized as protected in *Roth.* Twenty years ago, Lt. Muscare successfully fulfilled the requirements of a merit civil service system. Since that time, he made his living and his career as a permanent employee of the Chicago Fire Department. Over these years, his expectation of continued employment as a fire-fighter became his property—a property as valuable to him as "real estate, chattels or money." *Roth, supra,* 408 U. S., at 571-572.

botham, 403 U. S. 207, 91 S. Ct. 1772 (1971); *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 76 S. Ct. 637 (1956); *Wieman* v. *Updegraff*, 344 U. S. 183, 73 S. Ct. 215 (1952).[14] In *Goss, supra*, this Court ruled that the due process clause protects such a property interest from suspension.[15] So, too, Lt. Muscare possesses an interest protected against summary suspension by the due process clause.

This case is even more compelling than *Goss*. In *Goss*, under the Ohio statute establishing the school system, the principal enjoyed an unreviewable right to suspend a student for fewer than ten days without any statutory requirement of just cause. 419 U. S., at 573. Here, however, any suspension of a public employee for longer than five days must meet a statutory standard of "propriety." *Ill. Rev. Stat.*, Ch. 24, § 10-1-18. Petitioner's statement that "Under Illinois law [in suspensions of over five days] Muscare had a statutory right to back pay and correction of his employment record, in the event he was

14. Outside the area of public employment, this Court has repeatedly prohibited the state from interfering with a variety of other comparable property interests, absent prior procedures which comport with due process. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 95 S. Ct. 719 (1975); *Goss, supra; Fuentes* v. *Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); *Bell* v. *Burson*, 402 U. S. 535, 91 S. Ct. 1586 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1011 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 89 S. Ct. 1820 (1969).

15. Analogizing the students' rights in *Goss* to those of public employees, this Court ruled that once a statute creates an over-all interest in public education, the protected interest may not be suspended in a manner violative of the Due Process Clause:

> It is true that § 3313.66 of the code permits school principals to suspend students for up to two weeks; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellee's class generally, Ohio may not withdraw that right on the grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred. *Goss, supra*, 419 U. S., at 573-574.

vindicated" (Pet. Br., p. 32), concedes the existence of Muscare's property interest in this case.[16]

In addition, the Rules and Regulations of the Fire Department provide that Lt. Muscare's suspension could not have been imposed without cause. Under the Rules, the Department provides an elaborate list of specific causes to support a whole range of penalties. Rules and Regulations of the Chicago Fire Department, Part VI. The Fire Department does not distinguish between causes for penalties of fewer than thirty days and causes for penalties of greater length. The list of offenses in the Fire Department Rules expose the offender to the list of potential penalties from reprimand to discharge, and no one in this case contends that Lt. Muscare or any other fire fighter may be suspended for any length of time arbitrarily or for causes not specified in the Rules. Thus, Lt. Muscare's property right in his employment is protected against a suspension of fewer than thirty days. Where, as here, protected property rights are involved, Lt. Muscare's right to a fair procedure before he is deprived of his property is a matter of "constitutional guarantee." *Arnett, supra*, 416 U. S., at 167 (Powell, J., concurring).

II.

The Court of Appeals Correctly Ruled That Lt. Muscare Had a Right to Notice and a Hearing Before His Suspension

Reversing the judgment of the District Court in this case, the Court of Appeals found that: "No hearing of any kind was accorded Appellant before his suspension" (A. 164). Under these circumstances, unless an emergency is involved,[17] the Court

16. In *Kropel, supra*, the Illinois Supreme Court has also ruled that a tenured public employee is protected under this provision of Illinois law against "unwarranted" suspensions of fewer than thirty days. 60 Ill. 2d, at 27.

17. The Court of Appeals excluded from its ruling the:

> ". . . 'wide variety of situations [in which] it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action

(Continued on next page)

ruled, a permanent public employee may not be separated from his employment with no prior procedures of any kind. By so ruling, the Court of Appeals has required the Petitioner to conform to the standards set forth by this Court in *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313, 70 S. Ct. 652 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In recent years, this Court has reiterated and elaborated on this commitment to the principle that some measure of due process must precede the imposition of a deprivation. *Goss, supra; North Georgia Finishing Co., supra; Arnett, supra; Fuentes, supra; Roth, supra; Boddie* v. *Connecticut*, 401 U. S. 371, 91 S. Ct. 780 (1971); *Bell, supra; Goldberg, supra; Sniadach, supra; cf. Gerstein* v. *Pugh*, 420 U. S. 103, 95 S. Ct. 854 (1975); *Wolff* v. *McDonnell*, 418 U. S. 539, 94 S. Ct. 2963 (1973); *Morrissey* v. *Brewer*, 408 U. S. 471, 92 S. Ct. 2593

(Continued from preceding page)

> pending a later hearing' R. A. Holman & Co. v. SEC, 299 F. 2d 127, 131 (D. C. Cir.) cert. den. 370 U. S. 911 (1962)."

In this case, however, the Court concluded:

> "Here, we perceive no such justification for avoiding the requirement of a pre-suspension hearing . . . there is merit to appellants' comment . . . that the present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the service of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974." [A. 165]

As noted, *supra*, pp. 4-5, after the ruling of the Court of Appeals in this action, the City of Chicago amended its Regulations governing the suspension of permanent civil servants to provide for pre-suspension hearings, except in emergencies. Such regulations have been in force since August 1975. To date, the business of the City has proceeded without visible disruption.

(1972). Throughout these cases, which range from access to the judicial process, *Boddie, supra,* to the continued possession of a stove, *Fuentes, supra,* this Court repeatedly ruled that notice and the opportunity for a civil hearing must be offered prior to the taking.

Ruling in *Sniadach, supra,* 395 U. S., at 339, 342, to invalidate the Wisconsin pre-judgment garnishment statute, the Court specifically rejected a later hearing as inadequate:

> . . . wages are frozen (footnote omitted). [Wages] may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.
>
> * * * * *
>
> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423, 35 S. Ct. 625, 628, 59 L. Ed. 1027) this prejudgment garnishment procedure violates the fundamental principles of due process.

In *Roth, supra,* 408 U. S., at 569-570, this Court was confronted, as here, with the question of the proper procedure for termination of a public employee. Speaking to the very issue of the timing of the requisite notice and hearing, this Court said:

> When protected interests are implicated, the right to some kind of *prior* hearing is paramount. (emphasis in original.)

Arnett, supra, was decided in the context of a statute providing protective proceedings for the employee thirty days prior to discharge.[18] Concurring to make a majority in *Arnett,* 416 U. S.,

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18. Petitioner's contention that this Court's denial of a full blown predischarge trial in *Arnett* supports the arbitrary actions against Muscare (Pet. Br., pp. 21-26), simply ignores the opinions of a majority of this Court in that case. (416 U. S., at 164, 171, 206).

at 170-171, two of the five members of this Court specifically noted that:

> . . . the affected employee is provided with 30 days advance written notice of the reasons for his proposed discharge and the material on which his notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to this case . . .
>
> The present statute and regulations comport with due process by providing a reasonable *accommodation* of the competing interests. (Concurring opinion of Powell, J., joined by Blackmum, J.; emphasis added.)

Nonetheless, Mr. Justice White dissented from the Court's opinion on the grounds that the procedures preceding a discharge were not adequately protective in that case, and three other Justices dissented entirely, opining that a full trial is required before a discharge.[19]

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19. See also, *Boehning* v. *Indiana State Employees Association, Inc.*, No. 75-1544, 44 U. S. L. W. 3275, where this Court recently indicated that the pre-termination protections available by statute were essential to its determination in *Arnett:*

> . . . the tenured employee's right to a pre-removal hearing has been determined by this Court only in the context of a statute providing notice and an opportunity to respond in writing before removal coupled with a full hearing after removal. See concurring opinion of Powell, J., Arnett v. Kennedy, supra, at 164, 170.

In the instant case, the State statute does not provide any such "full hearing." The law contains no provision requiring prompt later procedures even in a post-suspension review. Moreover, in *Kropel, supra,* the Illinois Supreme Court recently ruled that, in the post-suspension hearing, the employee must bear the burden of establishing why the suspension is unwarranted. 60 Ill. 2d, at 27. In the instant case, the unfairness of requiring Lt. Muscare to prove his innocence under *Kropel* is further exacerbated by the abbreviated notice form, containing nothing but references to Rule numbers with none of the underlying facts revealed. *See, infra,* n. 25 at p. 21.

In *Goss, supra,* this Court ruled that a child in school cannot be summarily severed from his daily business until *after* he has a chance to speak on his own behalf: ". . . as a general rule notice and hearing should precede removal of the student from school." 419 U. S., at 582.[20] In the instant case, the Court of Appeals ruled that the right to timely procedures also protects this adult breadwinner. This Court has similarly ruled that where, as here, the State acts to deprive an adult of his living proper procedures are required prior to the taking. *Bell, supra; Goldberg, supra; Sniadach, supra; cf. Gerstein, supra,* 420 U. S., at 114. Concurring in *North Georgia Finishing, Inc.*, Mr. Justice Powell reiterated that, under *Sniadach,* the most protective of procedures pertains where a person's living is at issue.[21] Even while dissenting from this Court's opinion in *Goss,* Mr. Justice Powell acknowledged that the policy considerations which led him to dissent are largely absent in the case of an

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20. Petitioner erroneously contends that, under *Goss,* due process is satisfied even where a hearing is not granted until promptly after suspension or expulsion (Pet. Br., p. 20). Not surprisingly, Petitioner can find no language from the majority opinion in *Goss* to support this contention, and Petitioner's sole authority for his contention, a quotation from the dissenting opinion of Mr. Justice Powell [Pet. Br., pp. 20-21], is misplaced. In dissent, Mr. Justice Powell was characterizing the entire majority opinion, which includes a provision for delay of hearing only in an emergency. To quote the majority directly:

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. 419 U. S., at 582-583.

Thus, Petitioner mistakenly attempts to apply authority directed solely at the emergency situation to this action, which has no such implications.

21. Mr. Justice Powell stated:

> The Court also cites *Sniadach* v. *Family Finance Corp.* [cite] which established an exception for garnishment of an individual's wages. In such cases, the due process clause requires notice and a hearing *prior* to application of the garnishment remedy. 419 U. S., at 611, n. 2 (Concurring opinion of Powell, J.).

employer and an employee.[22] Accordingly, the Court of Appeals for the Seventh Circuit properly noted the seriousness of the deprivation in this action:

> In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are more damaging, for reputations, careers, and substantial amounts of lost pay are at stake (A. 163-164).

As the Court of Appeals found, with no prior notice or opportunity to defend himself, Lt. Muscare, an adult with twenty years service in his job, lost his entire paycheck for 29 days, a loss amounting to at least $1,400.00 (A. 164). Such a deprivation is prohibited by the due process clause and cannot be countenanced.

22. Mr. Justice Powell noted:

> In this regard, the relationship between a student and a teacher is manifestly different from that between a welfare administrator and a recipient (see Goldberg v. Kelly, *supra*), a motor vehicle department and a driver (see Bell v. Burson, *supra*), a debtor and a creditor (see Sniadach v. Family Finance Corp., *supra;* Fuentes v. Shevin, *supra;* Mitchell v. W. T. Grant, 416 U. S. 600, 94 S. Ct. 1805, 40 L.Ed. 406 (1974)), a parole officer and a parolee (see Morrissey v. Brewer, *supra*), or even an employer and an employee (see Arnett v. Kennedy, *supra*). In many of these non-education settings there is—for purposes of this analysis—a "faceless" administrator dealing with an equally "faceless" recipient of some form of government benefit or license; . . ." 419 U. S., at 594.

III.

The Fire Department's Actions in This Case Did Not Satisfy the Requirements of Due Process

A. Respondent Did Not Receive Adequate and Timely Notice

In its opinion in this case, the Court of Appeals found that Petitioner had provided Lt. Muscare with none of the procedures required by due process prior to depriving him of his employment. In his brief to this Court, Petitioner contends that his actions prior to suspending Lt. Muscare constituted "fairness, which is the essence of due process" (Pet. Br., p. 31). "Indeed," the Petitioner continues, "his [Lt. Muscare's] flouting of the Fire Department rule well known to all Chicago Fire Fighters, was dealt with in a spirit of forebearance and patience" (Pet. Br., p. 31).[23] Petitioner attempts to support this assertion on the grounds that approximately two and one-half months before the suspension, Chief Morgan, one of Respondent's superiors, said to Lt. Muscare to shave his goatee and that he was "working under charges" (Pet. Br., p. 31).

Morgan's conversation with Lt. Muscare did not approach the notice required by the due process clause.[24] First, Lt. Muscare was not told what the charges against him were. At most, Morgan's words alluded only to Petitioner's goatee, and Morgan did not even direct Lt. Muscare specifically to the Personal Appearance Rule. Morgan mentioned nothing about any other violation, yet Petitioner's letter of suspension detailed the section num-

23. Lt. Muscare was suspended for 29 days. Chief Foley, who selected the length of the suspension, acknowledged that he knew that any longer suspension would involve "going through the trial court" (A. 135) and that he knew that reference of the case to the Civil Service Commission would deprive the Fire Department of the summary power to determine Lt. Muscare's fate (A. 136).

24. Since Lt. Muscare was not apprised of either the nature of the charges against him, the facts supporting the charges or the potential action awaiting him, he could not have responded to an opportunity for a hearing in any meaningful way.

bers of two other Department Rules which Muscare is alleged to have violated. Accordingly, Lt. Muscare had no warning from Morgan that he would be suspended for, *inter alia*, "failure to obey orders" and "conduct unbecoming an employee or member of the Chicago Fire Department."

Further, Morgan said nothing to Lt. Muscare about the facts underlying any of the charges ultimately lodged against Lt. Muscare. Although Petitioner's entire case at trial rested on the alleged safety problems posed by Muscare's goatee, Morgan never mentioned safety to Muscare. It was not until the federal court trial that Chief Foley revealed to Lt. Muscare that, when he determined to suspend Lt. Muscare for 29 days, he thought that Lt. Muscare had deliberately disobeyed a direct order and that Lt. Muscare was responsible for other, earlier incidents.

Finally, Morgan told Lt. Muscare nothing about the consequences he was facing. Chief Morgan was not even authorized to decide what consequences to impose on Lt. Muscare, and Chief Foley testified that he had no intention of imposing any punishment on Lt. Muscare in December, at the time of Muscare's alleged "notice". Two and one-half months later, in February, when Foley changed his mind and decided to discipline Lt. Muscare consequent to the earlier "charges", Lt. Muscare was told nothing of the decision until it was implemented.[25]

In contrast to Petitioner's conduct herein, this Court has repeatedly ruled that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed.

25. Even after implementation of the suspension, the Braun letter certainly cannot withstand constitutional scrutiny, since it also says nothing about the facts underlying the charged misconduct. As noted above, n. 19 at p. 18, under *Kropel*, Lt. Muscare would bear the burden of proving his innocence based on the wholly inadequate "notice" provided by Braun.

> 278, 132 A. L. R. 1357; Grannis v. Ordean, 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; Priest v. Board of Trustees of Town of Las Vegas, 232 U. S. 604, 34 S. Ct. 443, 58 L. Ed. 751; Roller v. Holly, 176 U. S. 398, 20 S. Ct. 410 44 L. Ed. 520. The Notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U. S. 71, 29 S. Ct. 580, 53 L. Ed. 914. *Mullane, supra*, 339 U. S., at 314.

More recently, this Court succinctly held:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity. *Application of Gault*, 387 U. S. 1, 33, 87 S. Ct. 1428 (1967).

Accord, Goss, supra; Wolff, supra; Arnett, supra; Goldberg, supra; Armstrong v. *Manzo*, 380 U. S. 545, 85 S. Ct. 1187 (1965); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 71 S. Ct. 624 (1957) (concurring opinion of Mr. Justice Frankfurter).

In *Goss, supra*, this Court ruled that even in the context of school disorders the school must give the student notice of the alleged "defalcation," the "basis for the principal's belief he was involved," the "charges against him" and, if he denies the charges, "an explanation of the evidence the authorities have." *Goss, supra*, 419 U. S., at 581. In *Arnett, supra*, 416 U. S., at 170, the employee received thirty days advance notice of the "reasons for his proposed discharge and the materials on which the notice is based." In *Goldberg, supra*, 397 U. S., at 267, the Court ruled that where welfare benefits are to be terminated, the principles of due process "require . . . notice detailing the reasons for the proposed termination."

Plainly, Petitioner's conduct in this case does not approach the minimal notice required by due process.

B. Respondent Did Not Have an Opportunity for a Timely Hearing

As the Court of Appeals ruled, Lt. Muscare received no opportunity at all for a hearing prior to the action against him, in violation of his rights under the due process clause. Even in *Goss, supra,* where concerns of public policy weigh heavily on the side of abbreviated procedures, this Court ruled that, at minimum, the student must receive "an opportunity to present his side of the story." 419 U. S., at 581.[26]

In *Bell, supra,* 402 U. S., at 542, where the interest at stake was only a license to drive, this Court ruled:

> We hold, then, that under Georgia's present statutory scheme, before the State may deprive petitioner of his driver's license and vehicle registration it *must provide a forum* for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. (emphasis added.)

Petitioner does not even assert that anyone made any effort to give Lt. Muscare a prior hearing. Morgan could not have given Lt. Muscare such a hearing, since a hearing which satisfies due process must be held before someone authorized to decide the issue (*Arnett, supra,* 416 U. S., at 170; *Goss, supra*), and Chief Foley, who was authorized to decide the issue, never saw the man.

In *post hoc* defense of his failure to provide such a hearing, Petitioner asserts that Lt. Muscare was not entitled to an opportunity for a hearing, because "The only actual issue in dispute was the constitutional validity of the departmental facial hair rule [which] could not be determined by an administrative hearing." (Pet. Br., p. 31). Plainly, the constitutional right to an opportunity for a hearing cannot rest on an administrator's

26. This Court observed:

> But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his defalcation and to let him tell his side of the story in order to make sure that an injustice is not done. 419 U. S., at 580.

unilateral determination in advance of what might be in dispute should such a hearing take place. In February 1974, Chief Foley determined to charge Lt. Muscare with violations of three Fire Department Rules. Under the due process clause, Lt. Muscare was entitled to an opportunity to be heard on those alleged violations before he was deprived of his property rights. It is the opportunity for hearing which he claims, and Petitioner cannot now defend his failure to provide that opportunity by asserting that (now that Petitioner has had a chance to find out some of the facts involved at the federal trial on Respondent's challenge to his procedures) such a hearing would not have been useful.[27]

The instant case well illustrates why the Constitutional right to a hearing cannot depend on the administrator's prediction of what a hearing might reveal. In contending that a hearing is not required here, Petitioner asserts that Lt. Muscare could have made no factual defense. To the contrary, each of the three charges levied against Lt. Muscare raises a host of factual issues for which a hearing is indispensable.

Thus, regarding disobedience of orders, Chief Foley volunteered at trial that one reason for the severity of Lt. Muscare's punishment was that he hadn't "complied" with what Foley considered an order to shave. The most minimal of due process hearings would have revealed who ordered what and when, whether the order was clearly stated, and whether Lt. Muscare heard and understood the order. Petitioner cannot unilaterally dis-

27. In *Goss, supra, Gerstein, supra,* and *Sniadach, supra,* this Court ruled that the individuals involved were entitled to the opportunity for a hearing without regard to what it thought the hearing would ultimately have revealed. In *Goss,* one of the students summarily suspended was Rudolph Sutton, who, in the presence of the principal, physically attacked a police officer. 419 U. S., at 570. In *Gerstein, supra,* the plaintiffs, challenging their pretrial detention without a hearing on probable cause, were all convicted of the offenses by the time the case reached the Supreme Court. 420 U. S., at 110. In *Sniadach, supra.* the wage earner, challenging the garnishment proceedings, filed an affidavit in the state court proceedings which did not deny her indebtedness. 395 U. S., at 347.

pose of the requirement of a hearing on this issue by asserting, without even a citation to the record, "that Muscare violated his superior's order is not disputed." (Pet. Br., p. 31).

Regarding "Conduct unbecoming," even if Lt. Muscare knew in advance what types of conduct constituted a violation of this prohibition,[28] and even if he had proper notice of what unbecoming conduct was charged against him, he was at least entitled to an opportunity to be heard on the accusation. The charge of unbecoming conduct most vividly illustrates the need for a hearing to identify the behavior at issue before an adult is separated from his living.

Further, assuming, *arguendo,* that the only matter to be considered at a hearing was Lt. Muscare's compliance with the proper personal appearance rule, there are factual issues to be determined at a hearing in that regard. Petitioner contends that the personal appearance rule is justified by the Fire Department's concern for safety in use of the face mask. However, all witnesses at trial agreed that this face mask can be tested only by the individual involved, and Lt. Muscare testified without rebuttal that his face mask operated safely while he wore his goatee. Chief Foley never even asked to see Lt. Muscare, much less to witness a test of this particular equipment. Lt. Muscare has contended throughout this litigation that the Fire Department's considerations of safe use of the breathing apparatus do not support the personal appearance rule. Thus, a hearing would have enabled him to demonstrate that the rule is ill-suited to advance the interests of safety and should not be enforced against him.

Further, Petitioner asserts, without citation to any authority, that the Fire Department could not have recognized the constitutional infirmity of its own rules at a hearing prior to applying the rule to Lt. Muscare (Pet. Br., p. 31). To the contrary,

28. Lt. Muscare testified that in twenty years with the Fire Department, he had never been informed of what constitutes unbecoming conduct under § 61.001 of the Rules.

a state and its agencies have a duty to comply with the Constitution, *Georgia Power Co.* v. *City of Decatur,* 281 U. S. 505, 508; 50 S. Ct. 369 (1930), and, unlike a case challenging a statute or an ordinance, here no policy considerations prohibit the Department from considering a challenge to its own rule.[29]

Finally, Lt Muscare was entitled to an opportunity for a hearing to present evidence in mitigation of the prospective punishment. *Gagnon* v. *Scarpelli,* 411 U. S. 778, 790, 93 S. Ct. 1756 (1973); *Morrissey* v. *Brewer, supra; Cooke* v. *United States,* 267 U. S. 517, 538 (1925). As illustrated by the record in the trial on the constitutional issues alone, there were numerous facts relevant to mitigation at issue between the parties. For example, Chief Foley has admitted that he selected the longest summary suspension time for Lt. Muscare, partly because of his impression of prior incidents in which he had not even participated and partly to punish Lt. Muscare for what Foley viewed as deliberate insubordination. Lt. Muscare had no opportunity to explain or contest these assumptions. Further, the Department defended the appearance rule on grounds of an alleged safety hazard. Lt. Muscare, an experienced firefighter, denied that he posed any safety hazard. He testified without rebuttal that his mask operated safely at drill and on actual duty. Lt. Muscare was charged with unbecoming conduct. Had he been informed of his alleged transgression, he might have made some explanation. Thus, each dispute regarding the three charges against Lt. Muscare would also have been relevant to mitigate the severity of his punishment.

29. Indeed, Petitioner himself acknowledges that, had Lt. Muscare not sought his federal remedy, he could have disputed the constitutionality of the appearance regulation at an administrative hearing within the Fire Department, either before or after the suspension:

> "[The District Court ruling sustaining] the Constitutionality of the regulation . . . disposed of the only issue that would have been in dispute if a pre-suspension administrative hearing had been held, the only issue that would have been in controversy if Muscare had exercised his statutory right to a post-suspension hearing." (Pet. Br., p. 33.)

For all of these reasons, the denial of a hearing to Lt. Muscare before his suspension was imposed constituted a deprivation of due process, and Petitioner cannot now redeem his actions by denying the utility of this fundamental protection.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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